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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 231

DUN & BRADSTREET, INC.

Petitioner,

against

G. L. NICKLAUS, Trustee in Bankruptcy for FORDYCE WOOD PRODUCTS, INC.,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PIONEER

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ADDITIONAL STATEMENT

By pre-trial stipulation, the original parties agreed to the actual facts of the matters referred to in Petitioner's reports involved in this case. The stipulation first reflected the fact of the filing of a federal tax lien in the office of the Circuit Clerk on November 28, 1960, and of its satisfaction on December 1, 1960, and then set out the following agreement of the parties (R. 17):

> "No complaint was filed in any court nor was there any lien filed separately or specifically against the plaintiff's bank account."

These provisions of the pre-trial stipulation were read to the jury by Plaintiff at the outset of the trial (R. 23).

On the burden of proof, the Trial Court instructed the jury that the burden was on the Plaintiff, among other things, to establish by a preponderance of the evidence:

"that one or both of the reports or statements referred to in the evidence was or were false." (R. 535)

The Trial Court then gave that part of the charge relating to the falsity of the reports quoted in Petitioner's Statement (Petition 6). The remainder of the instruction on falsity not quoted by Petitioner, was:

"I think that I should tell you in this connection that the falsity of the report of December 6 lay in the fact that it advised its recipients that a suit had been filed by the United States against plaintiff, that a federal tax lien had been filed against plaintiff, and, further, that an additional lien had been filed against plaintiff's bank account. Now, while it is true that on November 28, 1960, the Government filed a notice of an internal revenue tax lien against plaintiff with the Circuit Clerk of Dallas County, Arkansas, there was never any suit filed against the plaintiff by the Government, and there was never any specific lien filed against the bank account, although, of course, the general notice of lien affected the bank account as well as plaintiff's other assets.

"The second statement was false in that it referred again to a specific lien against the bank account whereas there was never any such specific lien.

"Of course, the mere fact that the statements were false is not alone sufficient to justify you in returning a verdict for the plaintiff. As I have stated, you must further find that the statements, or at least one of them, was or were defamatory, and that the falsity and the defamatory nature, if any, of the statement or statements was a proximate cause of damage to the plaintiff; and the burden is on the plaintiff to estab-

lish the defamatory nature of the statements and damage resulting therefrom by a preponderance of the evidence." (R. 535-36)

The tax lien filed on November 28, 1960, was in fact paid and satisfied of record on December 1, 1960, five days before the initial report of December 6, 1960 (Pl. Ex. 30, R. 24, 25), was published to at least fifty-one of Petitioner's subscribers (R. 17; 225-226). The fact of satisfaction of the lien was not disclosed by Petitioner to those subscribers until the report of March 6, 1961 (Pl. Ex. 33, R. 24, 25). Up to March 6, 1961, Petitioner continued to send the same December 6, 1960, report to other subscribers who for the first time had requested credit information on Plaintiff, but did not notify them that the lien had been satisfied (R. 114; R. 162-163).

It was Petitioner's policy not to make a search for and report on satisfactions of judgments and liens, except once every six months to a year, and forms sent out by Petitioner to its correspondents sought only the bad information on subjects (R. 81; 92; 100; 109-111).

Neither Mrs. Morgan, the Plaintiff's correspondent, nor anyone in Petitioner's Little Rock office tried to verify the second-hand information (Petition 4) about the lien against Plaintiff's bank account (R. 99; 111; 127-129; 133-134; 152-155). Petitioner's Little Rock office had no system for screening or reviewing the report before it was sent out to its subscribers (R. 115-116; 125; 153). Someone in the Little Rock office, in preparing the report to be distributed to subscribers, had supplemented the information sent in by Mrs. Morgan, by adding the statement: "Suit styled *U. S. A.* v. *Fordyce Wood Products, Inc.*, filed November 28, 1960, cause of action, * * * *" (Pl. Ex. 30, R. 24, 25; Pl. Ex. 29, R. 97-98; R. 107).

Before Petitioner's Little Rock office sent out the March 6, 1961 report, its Service Manager was notified

that there had never been any lien on the bank account (R. 140, 146). The Service Manager arranged for the preparation of the March 6, 1961 report (R. 125-126) and saw it before it was sent out (R. 133). This report repeated the reference to "lien on bank account":

> "It is further understood that lien on bank account has also been satisfied 3-6-61 (066C-9)." (Pl. Ex. 33, R-24—Petition, 6)

The Service Manager made no further investigation at that time regarding the lien on the bank account and knew of none that was made (R. 133-134).[1]

At no stage of the proceedings in the Trial Court did Petitioner raise the constitutional issue, or make any objection to the Court's instructions on constitutional grounds (R. 530, 532, 543-545).

Neither the Trial Court nor the Court of Appeals has made any decision in this case on the constitutional questions presented by this Petition (Appendix to Petition, 2 a — 10 a; 13 a — 30 a).

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[1] In describing why no investigation was made, the Service Manager testified: (R. 133-134)

"A. Well, at that time we were not definitely sure whether there had been or not (lien on bank account) and the important factor anyway in our opinion was that the tax lien had been released and, as far as I was concerned, in my opinion, the lien on the bank account whether it had been or hadn't been was not of enough significance to worry about."

REASONS WHY CERTIORARI SHOULD BE DENIED

1. Petitioner has made no showing that the Court of Appeals has rendered a decision falling within the scope or purview of Rule 19 1(b) of this Court.

2. The constitutional issue was never raised by Petitioner, either during the trial or on the appeal, until it came before the Court of Appeals on Petition for Rehearing.

3. No "public official" and no "official conduct" are involved, and *New York Times* v. *Sullivan* has no application.

4. The case, being one of a purely private and commercial nature, does not present any matter of great and important public interest, and the libel committed here is not constitutionally protected.

5. Petitioner was not deprived of the defense of "substantial truth" and the matter of "burden of proof" to prove truth is immaterial, under the facts of this case.

6. In respect to malice, the case was tried under applicable state standards, which were substantially the same as laid down in *New York Times* v. *Sullivan*.

ARGUMENT FOR DENYING THE WRIT

Absence of Jurisdiction

Petitioner has not demonstrated that this case comes within any of the considerations governing review on certiorari, as set out in Rule 19 1(b) of this Court. The Court of Appeals has made no decision adjudicating the federal or constitutional question, unless it could be said that its order denying rehearing amounted to such an adjudication. Neither has it been shown that there is anything in the decision of the Court of Appeals which is in conflict with applicable decisions of this Court.

The case was tried in the traditional way and in accordance with accepted and recognized principles of the law of libel applicable in the state (Opinion of Court of Appeals, Appendix to Petition, 8 a). See also, *Dun & Bradstreet* v. *Robinson*, 233 Ark. 168, 345 S. W. 2d 34. Thus, there has not been such a departure from the accepted and usual course of judicial proceedings, by the affirmance of the judgment of the Trial Court, as to require the exercise of this Court's power of supervision.

The considerations for review under the Rules being lacking, and the libel committed here being of a commercial nature and involving only private citizens, there is no special or compelling reason why this Court should undertake a review of the case.

Although Petitioner concedes (Petition 2) that it did not raise the constitutional issue in a timely manner, it argues that this does not necessarily prevent review by this Court, by reason of the decision in *Griffin* v. *California*, 14 L. ed. 2d 106, 85 S. Ct. 1229 (April 28, 1965) and other authorities cited in its Footnote 3 (Petition 2). There is no showing that the results in this case would have been any different had *New York Times* v. *Sullivan*

been decided earlier and had been under consideration by the courts below.

Neither does it appear that Petitioner was necessarily precluded from acquainting the Court of Appeals with *New York Times* v. *Sullivan*. There was still a span of almost eleven months from the time *New York Times* was decided until the Court of Appeals rendered its decision on February 3, 1965.

The first two cases cited by Petitioner as supporting its claim that the Court can now consider the constitutional issue, though it was not raised in the courts below, were cases in which the Court refused to consider the new issue. Each of the other three cases involved a situation where the Court noted, that if the new issue were not considered, an injustice would otherwise result. The general rule on this subject is that an appellate court does not give consideration to issues not raised in the courts below, except "where the obvious result would be a plain miscarriage of justice." *Hormel* v. *Helvering*, 312 U. S. 552, 85 L. ed. 2d 1037, 61 S. Ct. 719.[2]

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[2] In *Dewey* v. *Des Moines*, 173 U. S. 193, at 199, the Court said:

"• • • *It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature. Hamilton Mfg. Company* v. *Massachusetts*, 6 Wall. 632.

"In order to be available in this court some claim or right must have been asserted in the court below by which it would appear *that the party asserting the right founded it to some degree upon the Constitution or laws or treaties of the United States.* • • •

"A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. *Hamilton Company* v. *Massachusetts, supra.* A point that was never raised cannot be said to have been decided adversely to a party who never set it up or in any way alluded to it." (emphasis added)

In *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, at 434, it was said:

"But it is also the settled practice of this Court in the exercise of its appellate jurisdiction, *that it is only in exceptional cases*, and then only in cases coming from the Federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." (emphasis added)

It seems to be only in those exceptional cases where the outcome would have been different had a decision of this Court altering the former state of the law been known at the time of the trial, that this Court has considered issues not raised below. Such a case is *Griffin* v. *California*, 85 S. Ct. 1229 (April 28, 1965).

The rule of *New York Times* and of *Garrison* v. *Louisiana*, 13 L. ed. 2d 125, 85 S. Ct. 209, applies only to criticism of the official conduct of a public official. That rule has not been applied to matters of private libel. Since the outcome here would not appear to have been influenced by either of these decisions in their strict application, and since the instant case was tried under standards quite similar to those adopted by the Court in *New York Times*, as will be pointed out more in detail later, no reasonable ground is shown to justify the Court in treating this as one of those "exceptional" cases. Under the settled appellate practice of this Court, the Petition should be denied.

The Libel Is Not Within the Area of Constitutionally Protected Speech

Petitioner is a credit reporting agency, which, under contractual relations with some of its subscribers and for a fee, undertook to supply credit information to them concerning the Plaintiff, Fordyce Wood Products, Inc. The circulation of the reports involved here was limited in nature, and on the basis of that and of their commercial and confidential character, Petitioner claimed a qualified privilege (Answer, R. 14-16), which was granted by the Trial Court (R. 536-537).

Petitioner thus received the benefits of this defense at the trial. Its present claim to First Amendment freedom, which would afford an "absolute" privilege and the right to an unfettered publication of the reports, is inconsistent with the basis for its defense of qualified privilege—

i. e., the restricted and confidential circulation of the reports. By relying on the defense of qualified privilege, then, Petitioner has waived the constitutional issue. *Pierce Oil Corporation* v. *Phoenix Refining Co.*, 259 U. S. 125, 66 L. ed. 855; *United States* v. *Oregon Lumber Co.*, 260 U. S. 290, 67 L. ed. 261; *Kausal* v. *George F. Nord Building Corp.*, (Ill. CA-7) 129 F. 2d 173, Cert. Den. 317 U. S. 670, 87 L. ed. 538.[3]

Actually, the contents of the reports were of little if any interest to anyone except those few of Petitioner's subscribers who for business or commercial reasons had requested and paid for that information. In this respect, the case bears considerable resemblance to *Valentine* v. *Chrestensen*, 316 U. S. 52, 86 L. ed. 1262, 62 S. Ct. 920 (1942), which was clearly distinguished in the Court's opinion in *New York Times* v. *Sullivan*.[4] In *Chrestensen*, the Court said:

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[3] "Furthermore, the right of free speech guaranteed by the Constitution of the United States, Amendment 1, and the Constitution of Illinois * * * is not an absolute right. It is a relative right that may be modified in its interplay with the rights of others, and *it may be waived by the party for whose benefit it was intended.*" (Emphasis Supplied) *Kausal* v. *George F. Nord Bldg. Corp.*, 129 F. 2d 173, 176.

"There is nothing in the nature of such a constitutional right as is here asserted to prevent it being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right." *Pierce Oil Corp.* v. *Phoenix Refining Co.*, 259 U. S. 125, 66 L. ed. 855.

[4] "The court in Chrestensen reaffirmed the constitutional protection for 'the freedom of communicating information and disseminating opinion'; its holding was based upon the factual conclusions that the handbill was 'purely commercial advertising' and that the protest against official action had been added only to evade the ordinance.

The publication here was not a 'commercial' advertisement in the sense in which the word was used in Chrestensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." *New York Times* v. *Sullivan*, 376 U. S. 254, 265-266, 11 L. ed. 2d 686, 698.

"We were equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." 316 U. S. 52, 54, 86 L. ed. 1262, 1265.

The reports circulated by Petitioner were purely "commercial." They bore no social significance nor promoted any interchange of ideas, expression of opinion, or discussion on matters within the area heretofore recognized by this Court as that to which the First Amendment freedoms apply. *New York Times* v. *Sullivan*, 376 U. S. 254, 11 L. ed. 686, 84 S. Ct. 710; *Garrison* v. *Louisiana*, 379 U. S. 64, 13 L. ed. 2d 125, 85 S. Ct. 209 (April 28, 1965); *Cox* v. *Louisiana*, 379 U. S. 536, 13 L. ed. 2d 471, 85 S. Ct. 453; *Lamont* v. *Postmaster General*, No. 491, Opinion of May 24, 1965, ____ U. S. ____, 14 L. ed. 2d 398.

Petitioner now seeks to have the Court extend the principles of *New York Times* v. *Sullivan* to a libel which has no relation whatever to a public official, official conduct, or public affairs. To do so would seriously weaken the whole rationale of that decision,[5] and deny to private citizens injured by libelous utterances the traditional rights and remedies which have long been recognized in the law.

To extend the rule of New York Times to situations such as this would open the floodgate and, indeed, might amount to a tacit admission of the inability of juries and of all the lower courts, both state and federal, to settle

[5] In holding that the publication in New York Times qualified for constitutional protection, the Court said: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See *Terminiello* v. *Chicago*, 337 U. S. 1, 4, 93 L. ed. 1131, 1134, 69 S. Ct. 894; *De Jonge* v. *Oregon*, 299 U. S. 353, 365, 81 L. ed. 278, 57 S. Ct. 255. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection." 376 U. S. 254, 270-271, 11 L. ed. 2d 686, 701.

questions of fact and determine their sufficiency, contrary to the Seventh Amendment.

That the Court should not extend the doctrine of New York Times to a case of this nature seems implicit in the explanation given by the Court in *New York Times* as to why it did not feel bound by its previous statements to the effect that the Constitution does not protect libelous publications. Footnote 6, 376 U. S. 268, 11 L. ed. 2d 699. It was pointed out that the Court in *Beauharnais* v. *Illinois*, 343 U. S. 250, 96 L. ed. 919, 72 S. Ct. 725, had reserved just such a question as was presented in New York Times, when it said, in Beauharnais:

> "'* * * for 'public men, are, as it were, public property,' and 'discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.'" 376 U. S. 268, 11 L. ed. 2d 699.

To apply the rule of *New York Times* to this case would also enter the unprotected area envisioned by Mr. Justice Goldberg in his concurring opinion in *New York Times*, in which Mr. Justice Douglas joined, when it was stated:

> "This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-governing society. *The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.* This, of course, cannot be said 'where public officials are concerned or where public

matters are involved . . .'' 376 U. S. 301-302, 11 L. ed. 2d 721 (emphasis added).

It would seem clear, then, that the former decisions of this Court that libelous publications are not protected by the Constitution[6] still stand, except as modified in *New York Times,* in circumstances involving criticism of the official conduct of a public official.

In fact, in *Beauharnais* the Court quoted the views of a unanimous Court in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 86 L. ed. 1031 as follows:

> ''It has been well observed that such utterances (libelous utterances) are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,'' 343 U. S. 250, 255-256, 96 L. ed. 919, 926.

The instant case is further distinguished from New York Times in respect to the concepts under which they were tried. In New York Times, the case was submitted to the jury under the theory that the statements were libelous per se, that legal injury was implied, that falsity and malice are presumed, and that general damages need not be proved but are presumed. 376 U. S. 262, 11 L. ed. 2d 696.

The case at bar was submitted to the jury on an entirely different theory and under standards similar to those adopted by the Court in New York Times. This was a case of libel per quod, and the burden was on the Plaintiff to prove by a preponderance of the evidence (1) the publi-

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[6] *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 86 L. ed. 1031, 67 S. Ct. 766; *Beauharnais* v. *Illinois,* 343 U. S. 250, 96 L. ed. 919, 72 S. Ct. 725; *Konigsberg* v. *State Bar of California,* 366 U. S. 36, 6 L. ed. 2d 105, 81 S. Ct. 997.

cations were false (the falsity being found by the Court as a matter of law from the stipulated facts); (2) that the falsity was defamatory to the Plaintiff; and (3) that the falsity and defamatory nature of the reports were the proximate cause of damage to the Plaintiff. (R. 535, 6) So, falsity, malice and damages were not presumed, as in *New York Times,* but had to be proven by evidence. Also, the Trial Court in the instant case had determined that Petitioner had a qualified privilege and that it would not be liable for its reports and any misinformation contained in them unless the privilege was abused, either by reason of malice or by excessive publication (R. 536-7).

The concept of malice under which this case was submitted to the jury was not unlike the standard adopted in *New York Times.*[7]

A similar concept of malice in the impersonal sense (as a basis for recovery of punitive damages) was involved in *Faulk* v. *Aware, Inc.,* 244 N. Y. S. 2d 259. There, the Appellate Division, after reducing the amount of recovery, affirmed a judgment for both compensatory and punitive

[7] In *New York Times,* this was said to be the "federal rule": "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U. S. 279-280, 11 L. ed. 2d 706.

The Court then held that the Alabama law permitting a presumption of malice in connection with general damages "is inconsistent with the federal rule." 376 U. S. 284, 11 L. ed. 2d 708-709.

Here, the Trial Judge defined malice in the impersonal sense "as the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights of others as to constitute ill will." (R. 537)

The Court of Appeals said (Appendix to Petition, 8 a): "The applicable standard, as stated in the Robinson case, is that Plaintiff • • • need only show the doing of an act without just cause or excuse, which is in reckless disregard as to its results upon the rights of others." See also *Dun & Bradstreet* v. *Robinson,* 233 Ark. 168, 345 S. W. 2d 34.

damages for libelous utterances against Faulk, a television artist and broadcaster. In *Faulk,* as in the instant case, there was no presumption of malice and damages, and proof of both was required. Nor was Faulk a public official, though, in a sense, he was a "public figure."

The New York Court of Appeals affirmed (200 N. E. 2d 778) and in a supplemental opinion, which did not change the result, it was shown that the Court had *New York Times* v. *Sullivan* before it. *Aware, Inc.* v. *Faulk,* 202 N. E. 2d 372.

Certiorari was denied by this Court. *Aware, Inc.* v. *Faulk,* 380 U. S. 916 (March 1, 1965, reh. den. April 6, 1965).

There is even less reason for bringing the libel of the instant case within the realm of constitutionally protected speech.

The Instructions on Falsity of Reports Were Correct, and Malice was Proved

Petitioner contends (Petition 10-11) that it was deprived of the defense of "substantial truth" by the Trial Court's instruction that the reports were false as a matter of law (R. 535-36). The argument as to the "gist" or "sting" of the reports appears to be the same as Petitioner made in the Court of Appeals. It is difficult now to equate this argument with *New York Times* or in any way with an abridgement of First Amendment freedoms.

As Respondent understands *New York Times* on this subject, the objection was that in Alabama all the essential elements to the plaintiff's case there were presumed, so that, in effect, the burden of establishing the traditional defense of truth was cast upon the defendant, and that it was next to impossible to carry that burden in the realm

of opinion, ideas, and political or social expression (376 U. S. at 271-3, 11 L. ed. 2d at 701, 2).

Nowhere in the Trial Court's instructions to the jury was the burden placed on Petitioner to prove truth (R. 532-42). On the contrary, there were no presumptions here as in *New York Times* and the burden was on Plaintiff to prove all the essential elements of its case, falsity, and that the false statements were defamatory and caused damage (R. 535). The Trial Court correctly ruled on the basis of the stipulation and undisputed facts (See Respondent's Statement) that the reports were false as a matter of law, and so instructed the jury.[8] But the Trial Court carefully pointed out in this instruction what part of the report was true and what parts were false, and limited the jury's consideration to the question whether the false parts were defamatory and caused damage (R. 535-36). Thus, the question whether the "gist or sting" of the reports lay in the true part or in the false parts was left to the jury.[9]

Under these instructions, Petitioner was free to persuade the jury that the "gist or sting" lay in the true part

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[8] On this subject the Court of Appeals said:

"There was no question or issue as to whether these two parts of the reports were false as the parties stipulated to the following: 'No complaint was filed in any court, nor was there any lien filed separately or specifically against the plaintiff's bank account.' *Since there was no genuine issue of fact on the truth or falsity of the reports,* the court's instructions with respect to the reports were proper." (Appendix to Petition, 6a) (Emphasis supplied)

[9] The Court of Appeals said:

"Such a contention, however, fails to consider the fact that such considerations actually relate to the matter of whether the reports were defamatory, or if defamatory, were the proximate cause of plaintiff's damages. *These considerations were specifically left to the jury for their consideration by the court's instructions.* When the paragraph of the charge of which the appellant complains is read as a part of the whole charge, *and we further consider the stipulation of the parties with respect to the reports,* the instruction as given correctly stated the applicable law." (Appendix to Petition 6a-7a) (Emphasis supplied)

of the reports and that Plaintiff was damaged by this part, rather than by the false parts.

Because of the undisputed facts set out in the stipulation, the reports were not "substantially true," and Petitioner was deprived of this as a defense only because the facts wholly failed to support that defense. This was simply the result of the usual judicial processes and in no way affected Petitioner's constitutional rights under the First Amendment.

As to malice, it has been shown earlier that the standards applied in the Trial Court comported with the "federal rule" set out in *New York Times* (Respondent's Footnote 7). But if the facts were to be further examined[10] there are other distinguishing features between *New York Times* and this case.

First, the Times did not prepare the content of the advertisement. It accepted it for publication from persons believed to be reliable and responsible. As an advertisement, the Times made no warranty of its accuracy, and its readers could take it or leave it as they wished. Times had no knowledge of the falsity. Under these facts, the Court held that the failure to investigate the accuracy of the content amounted to nothing more than negligence, and was constitutionally insufficient, under the "federal rule," to establish malice.

Here, however, the entire content of the reports was conceived, prepared, and circulated by Petitioner's own representatives. This was factual reporting, upon the accuracy of which the recipients could be expected to rely

[10] Both the Trial Court and Court of Appeals decided that there was "substantial evidence" to support the jury's finding of malice. (Appendix to Petition, 20a, 25a-26a; 8a)

Petitioner's sole objection was that there "was no substantial competent evidence of malice." (R. 532; 543-44)

and to take action, in respect to their business dealings with Plaintiff.[11]

Not only was there failure to investigate, but Petitioner had no system for avoiding the dissemination of false reports (R. 115-116; 125; 153), especially where, as here, the reports were not of a routine nature. The reckless handling of the reports in the Little Rock office is exemplified in the attitude of the Service Manager, Mr. Siegel (Respondent's Footnote 1), when he supervised the preparation and circulation of the March 6, 1961 report (Petition, 6), with knowledge that the reference to "lien on bank account" was in fact false (R. 140, 146).

Because of these differences in the facts and in the purposes served by the publications, *New York Times* furnishes no criterion for this Court to undertake an examination of the facts relating to malice.

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[11] The peculiar responsibility of Petitioner in such matters was noted in the earlier case of *Dun & Bradstreet* v. *Robinson*, 233 Ark. 168, 345 S. W. 2d 34, involving also the "reckless disregard" of Petitioner in sending out its reports. There the Supreme Court of Arkansas said:

> "Dun & Bradstreet enjoys the implicit confidence of its subscribers, as attested by witnesses in the cause before us. This confidence in the accuracy of Dun & Bradstreet reports places an even greater responsibility upon the company, and requires that its reports be compiled with regard to the effect that such report may have upon the rights or feelings of the person reported on, if it should develop that the information given is false." 345 S. W. 2d 34, 39.

CONCLUSION

This is not such an "exceptional" case as to require this Court to consider issues not properly raised in the courts below. In any event, it has been shown that the libel, being of a commercial and private nature, is not constitutionally protected.

The case was tried in the traditional way, according to standards approved in *New York Times*. It has already had the careful consideration of the District Court and Court of Appeals on the questions of instructions, malice and sufficiency of the evidence. Petitioner has not been without its day in court, and there is no such important or compelling public matter involved as to require further review by this Court. The Petition for Certiorari should be denied.

Dated August 2, 1965.

Respectfully submitted,

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